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No. 04-631

Supreme Court, U.S.
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In The
Supreme Court of the United States

STEPHEN RICHARDS,
in his official capacity as Secretary,
Kansas Department of Revenue,

Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent Prairie Band Potawatomi Nation's opposition to the certiorari petition rests principally on three propositions: (1) the balance-of-interests standard in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1981), applies because the Kansas fuel tax "is effectively consummated upon reservation delivery and is integrally related to and burdens on-reservation Tribal activity" (Opp'n 19); (2) no need exists to reconsider *White Mountain Apache* because "courts – including this Court – have refined the [decision's] analytical framework and applied it to specific factual situations without a problem" (Opp'n 22); and, (3) the court of appeals properly applied the *White Mountain Apache* standard because "[e]xcept in the 'unique' case (like this one) in which the State is burdening tribally generated on-reservation value, the Tenth Circuit has preserved the Kansas motor fuel tax, even as applied to fuel distributed to tribal retailers" (Opp'n 27) (citing *Sac and Fox Nation v. Pierce*, 213 F.3d 566 (10th Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001)). None of these propositions is correct.

First, Respondent ignores the fundamental fact that the taxable event under Kan. Stat. Ann. § 79-3408(c) (Supp. 2003) is the *receipt* of motor fuel by the distributor. The limited exceptions to the tax liability – *e.g.*, motor fuel sold to the United States – have no application here, and do not alter the point at which the distributor, manufacturer or distributor incurs tax liability. *Second*, the suggestion that application of the *White Mountain Apache* balancing test has proved unproblematic in a taxation context cannot be squared either with the two Tenth Circuit decisions addressing fuel taxes, the opinion below and *Sac and Fox*, or with the most recent Ninth Circuit decision concerning state authority to tax non-tribal entities doing business with tribes on reservation, *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1996). *Last*, Respondent's claim that state tax authority is limited to situations where a tribal retailer simply "markets" an exemption from a state tax, and that preemption of off-reservation state tax is proper merely because

customers are drawn to the station by Respondent's casino, ignores *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

ARGUMENT

1. Remarkably, Respondent neither refutes, nor directly addresses the State's first question presented in its petition. The State has asked this Court to consider whether, the interest-balancing test in *White Mountain Apache Tribe v. Bracker*, applies when a State taxes the *receipt* of fuel by distributors, and such receipt occurs off-reservation, simply because the fuel is later sold by a tribe to final consumers?

Respondent does not contradict the State's position that balancing under *White Mountain Apache* is improper when a State taxes or regulates off-reservation transactions. Instead, Respondent creates the straw man argument that the Kansas fuel tax is actually triggered by Respondent's use of the fuel for on-reservation sales (Opp'n 12).

However, Respondent mischaracterizes the "non-Indian conduct at issue" as the "distribution of fuel" for on-reservation sales, since the relevant conduct for tax purposes is the fuel's *receipt* off-reservation. Kan. Stat. Ann. § 79-3408(c) (Supp. 2003) thus provides in relevant part that, "the incidence of this tax is imposed on the distributor of the first *receipt* of the motor fuel." That such fuel may be marketed subsequently to an Indian tribe for retailing on or off-reservation is immaterial to State tax liability, because the legal obligation to pay the tax accrued upon receipt upstream, off-reservation. Respondent's re-characterization of the tax as "overwhelmingly concern[ing] on-reservation activity" is palpably inaccurate.

Notably, Respondent barely refers to this Court's decision in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995). This is understandable given the fact that the Circuit opinion below effectively eviscerates, *sub silentio*, the holdings of *Chickasaw Nation*. It is impossible to harmonize the Circuit decision with *Chickasaw Nation*, which held, "[i]f a State is unable to enforce a tax because

the legal incidence of the impost is on Indians or Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence." 515 U.S. at 460. Here, there is no question that Kansas is not taxing Respondent. Rather, the Circuit held that Kansas' fuel tax, imposed in a manner completely in harmony with and authorized by the holding of *Chickasaw Nation*, is, nevertheless improper because it interferes with the fact intensive, "unique" and "narrow" economic realities of Respondent's fuel sales.[1]

Further, aside from trying rewrite the Kansas fuel tax scheme itself, Respondent also fails to acknowledge forthrightly the unmistakable relevance of this Court's second holding in *Chickasaw Nation*. Two taxes were at stake in *Chickasaw Nation*: Oklahoma's fuel tax with respect to Indian country sales, and its tax imposed on income earned by tribal members who worked on tribal lands for the tribe but resided outside Indian country. The tribe argued that "Indians and Indian tribes are generally immune from state taxation." *Id.* at 464. The Court was not persuaded because "this principle does not apply

[1] Curiously, Respondent here and the Circuit decision below takes the position espoused by the state in *Chickasaw Nation* that incidence of tax should give way to economic realities, a position this Court readily swept aside. "The initial and frequently dispositive question in Indian tax cases, therefore, is who bears the legal incidence of a tax." *Chickasaw Nation*, 515 U.S. 450, 458. "But our focus on a tax's legal incidence accommodates the reality that tax administration requires predictability. The factors that would enter into an inquiry of the kind the State urges are daunting. If we were to make "economic reality" our guide, we might be obliged to consider, for example, how completely retailers can pass along tax increases without sacrificing sales volume – a complicated matter dependent on the characteristics of the market for the relevant product. *Cf. Yakima*, 502 U.S., at 267-268, 112 S.Ct., at 692- 693 (categorical approach safeguards against risk of litigation that could "engulf the States' annual assessment and taxation process, with the validity of each levy dependent upon a multiplicity of factors that vary from year to year, and from parcel to parcel"). *Id.* at 459-60. "A 'legal incidence' test, as 11 States with large Indian populations have informed us, 'provide[s] a reasonably bright-line standard which, from a tax administration perspective, responds to the need for substantial certainty as to the permissible scope of state taxation authority.'" *Id.* at 460.

outside Indian country." *Id.* Key to its determination was a prior conclusion with respect to where the taxable event took place, "That the receipt of income by a resident of the territory of a taxing sovereign is a taxable event is universally recognized. Domicil itself affords a basis for such taxation." *Id.* at 463 (quoting *New York ex rel., Cohn v. Graves*, 300 U.S. 308, 312 (1937)). *Chickasaw Nation* stands for the proposition that a court must honor what the state legislature has identified as the "taxable event."

This general rule, moreover, was unaffected by the States' discretion to exempt from such taxation "income earned outside their borders," since "'[i]f foreign income of a domiciliary taxpayer is exempted, this is an independent policy decision and not one compelled by jurisdictional considerations.'" *Id.* at 463 n.12. *Chickasaw Nation* additionally stands for the proposition that merely because a State may provide exemptions or deductions from a tax does not alter the legal incidence of the tax. There is a difference in the tax world between statutes imposing taxes and statutes granting exemptions or deductions from taxes. Respondent's opposition improperly blurs them into one.

Respondent's rhetorical sleight-of-hand – contending that "the on-reservation distribution of the fuel in this case is critical to determining whether the tax applies" (Opp'n 20) – cannot obscure the fact that such event occurs off-reservation when the distributor first receives fuel. State authority in this respect parallels and complements the earlier conclusion in *Chickasaw Nation* that the legislature may allocate legal incidence; *i.e.* the legislature has discretion to decide not only who constitutes the taxpayer but also when the obligation to pay the tax accrues.[2]

Respondent's reliance on *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980), and

[2] A legislature's designation of the legal incidence of a State tax is also presented by the petition for *writ of certiorari* in *Hammond v. Couer d'Alene Tribe*, No. 04-624, filed simultaneously with this writ.

Ramah Navajo School Board, Inc. v. Bureau of Revenue, 458 U.S. 832 (1982), for a contrary rule, misses the mark widely.

These two cases considered the validity of a State's taxing proceeds received from a tribe for, in *Central Machinery*, the sale of tractors *on* reservation (448 U.S. at 161 n.1) and, in *Ramah Navajo*, for the construction of an *on*-reservation tribal school (458 U.S. at 836). In these decisions the States unmistakably imposed tax on on-reservation transactions and relationships. Respondent appears to argue that each of these cases had some off-reservation aspects to support its reliance on their citation. It is clear, however, that the activity the States sought to tax in these cases occurred *on* reservation. The situation here differs dramatically because the State tax is imposed on an activity that occurs entirely off-reservation prior to any subsequent delivery.

Despite Respondent's protestations to the contrary, and its attempts to re-characterize the taxable event as being "delivery and distribution on reservation," all of the state statutes and the legally relevant element of the state tax at issue here (receipt by the distributor) occur off-reservation and upstream from Respondent.[3] Thus, the question still stands: whether, when a State taxes the off-reservation receipt of fuel by non-tribal distributors, manufacturers and importers, and such receipt occurs off-reservation, the interest-balancing test in *White Mountain Apache Tribe v. Bracker*, applies because the fuel is later sold by a tribe to final consumers?

2. Respondent offers little more than *ipse dixit* justification for maintaining the *White Mountain Apache* balance-of-interests test in the field of state regulation that this Court has recognized requires certainty of legal

[3] Naturally, Respondent does not want to address (and the Circuit's decision ignored) the final "link" of the fuel tax commerce chain, *i.e.* where is the fuel ultimately used? Respondent claims ultimate use is for on-reservation sales. (Opp'n 12) As the panel in *Sac and Fox* and the district court in this case unmistakably determined, the vast volume of the fuel purchased by retail customers is ultimately used on State roads and bridges.

authority. *Chickasaw Nation*, 515 U.S. at 460. The proffered justification – that the current balancing test has been applied "without a problem" (Opp'n 22) and that confusion arises, "[i]f anything, . . . because States continually devise new mechanisms for imposing taxes that affect Indians to avoid preemption" (Opp'n 23) – is simply not credible. Moreover, Respondent's reiteration in its opposition about myriad "unique" and "narrow" facts, and the laundry list of its economic situation simply begs the question as to whether balancing is viable.[4]

The difficulty in lower federal courts' application of *White Mountain Apache* where state taxes are challenged, and the attendant lack of predictability, cannot be fairly denied given both the decision below and the very case, *Sac and Fox*, that Respondent relies upon for its claim that, except in "unique" circumstances, "the Tenth Circuit has *preserved* the Kansas fuel tax, even as applied to fuel distributed to tribal retailers." (Opp'n 27). Here, as an illustration, the court of appeals relied upon the concept of "reservation value added" to invalidate the Kansas tax – a concept aimed at capturing the notion that most fuel purchasers at the tribal convenience store were drawn to the reservation by the casino. The elastic nature of that notion hardly needs detailed elaboration. Under the Circuit's approach, States likely will be required either to adduce or

[4] Two simple examples from the Circuit decision point to the inherent flaw of balancing: 1) The Circuit found that Respondent's fuel price is within two cents of market. Pet. App. 9-10. But what if it was four cents, six cents, eight cents, a dime below market? Now does the balance tip in favor of the State? What if it is two cents below market this week, and a dime below market next week? Where and when does the balance tip? 2) Respondent's fuel station was adjacent to Respondent's casino. Pet. App. 3. What if Respondent's fuel station was a quarter of a mile from its casino, a half-mile, one mile, two? How close does it have to be? When is it far enough away that it no longer "draws value" from a tribal casino? Do these same standards apply to the other three tribes in Kansas and their respective casinos and fuel stations? What about other tribal businesses? And how can a State effectively administer its tax policy with the legion of "unique" and "narrow" unknowns, some of which, like pricing, can shift from day-to-day?

rebut evidence related to, among other things, the nature of the product, how a tribe markets it, where the tribe markets it, what the selling price is, the demographic composition of a tribal establishment's clientele, and why those customers do business there. Suffice it to say, the permutations and the degree of significance of each permutation's "uniqueness" in order to "balance" are, literally, endless and unknowable for viable predictability of tax administration. Respondent is tellingly silent on the necessary implications of the interest balancing they portray as predictable.

The potential complexity in applying the *White Mountain Apache* standard is illustrated graphically in the State's Petition by the multi-factor "weighing" process in *Yavapai-Prescott*. There, the Ninth Circuit panel majority identified over 20 factual considerations that had been deemed relevant to the interest-balancing analysis in two prior circuit decisions and distilled, under the evidence before it, eight factors that favored preemption and six factors militated against preemption. *Id.* at 1109-12. It is not surprising that the panel's third member – examining the same facts – came to a different conclusion after engaging in his own assessment of the competing federal, state and federal interests. *Id.* at 1113 (Pregerson, J., dissenting).

Respondent's suggestion that States have precipitated any difficulty in applying *White Mountain Apache* by "devis[ing] new mechanisms for imposing taxes that affect Indians to avoid preemption" is cut from whole cloth. The Kansas statute simply imposes legal incidence upon the distributor's receipt of fuel off-reservation as authorized by this Court in *Chickasaw Nation*. 515 U.S. at 460. The Kansas fuel tax, in short, is not some form of devious or convoluted effort to sidestep the Court's precedent; it is instead a mainstream approach to the task of taxing motor fuel efficiently and comprehensively.

Finally, then-Justice Rehnquist, joined by two other members of this Court, dissented from the judgment in *Ramah Navajo* and remarked on the anomaly of "accord[ing] an Indian tribe, whose sovereignty 'exists only at the sufferance of Congress and is subject to complete

defeasance,' . . . greater immunity from state taxes than is enjoyed by the sovereignty of the United States on whom it is dependent." 458 U.S. at 856-57. This anomaly was compounded by the issuance "[a] short three months ago" of the decision in *United States v. New Mexico*, 455 U.S. 720 (1982), that upheld application of the same tax to federal contractors. 458 U.S. at 855 (Rehnquist, J., dissenting). The *New Mexico* rule, which assigns controlling weight to legal incidence, has shown itself capable of relative ease in application over the broad range of state taxation and adequately protects federal interests no less compelling than those here. The Court should adopt a preemption analysis based on the principle that Indian immunities are dependant upon congressional intent, and abandon the balance-of-interests standard that, aside from apparent doctrinal anomaly, introduces substantial uncertainty over the scope of state tax authority.

3. Respondent defends the court of appeals' application of the *White Mountain Apache* interest-balancing standards largely on the ground that "the Nation Station's customers are generated by the casino and other on-reservation values" and that "the State does not help maintain critical on-reservation roads." (Opp'n 25-26) The second of these contentions is unsupported by the record. Kansas built and maintains U.S. Highway 75, which runs through Respondent's reservation and over which access to the casino is gained from outside the reservation, and as to which Kansas enforces state motor vehicle law against both Indians and non-Indians. 18 U.S.C. § 3243. *See Negonsott v. Samuels*, 507 U.S. 99, 105-06 (1993).

Moreover, Respondent's massaging of the facts belies the record. Respondent's opposition leaves the impression that the State does nothing for roads and bridges on the reservation. In its Appendix Vol. III before the Circuit at page 134 Respondent stated: "The Nation's Road and Bridge Department . . . currently has responsibility for 118 miles of the 212 miles of roads on the reservation." The State of Kansas and its political subdivisions maintain the balance (approximately 45%) of reservation roads. Funding for these state road services comes in large part from the

state fuel taxes at issue here. The distributor, Respondent, Respondent's members, and Respondent's casino and fuel patrons enjoy the benefits of these significant on-reservation road services, as well as the entire State road system. Indeed, the absence of this integrated road system infrastructure provided by the State would make the existence of Respondent's casino and fuel station a practical impossibility. Respondent's phraseology disingenuously implies that the State provides no such infrastructure. The uncontroverted facts below showed precisely the opposite.

There is no legitimate dispute that Kansas provides the highway physical and regulatory infrastructure both on and off-reservation that enables fuel and fuel users to access the casino. This is not, in other words, "a case in which the State has nothing to do with the [alleged] on-reservation activity, save tax it." *Cotton Petroleum*, 490 U.S. at 186.

Accordingly, the Circuit's preemption determination is reduced to the conclusion that Respondent provides added reservation value. The basis for its conclusion is that the tribal casino provides the customer base for the Nation Station.

First, it needs to be stressed that the Kansas fuel tax is not "directed at fuel which . . . is derived primarily from value generated on the reservation." Pet. App. 13. There are no facts in the record that the fuel is "derived" on the Respondent's reservation, and the Kansas tax is not based on value, but rather it is based on volume of receipt by distributors, importers and manufacturers, which in this case occurs off-reservation. *E.g.*, Kan. Stat. Ann. 79-3408(a) (Supp. 2003) ("A tax *per gallon* or fraction thereof, at the rate computed as prescribed in K.S.A. 79-34,141, and amendments thereto, is hereby imposed. . . .").

Nevertheless, this Court has removed any doubt in *Cotton Petroleum* that the mere presence of "reservation value added" is not sufficient to preempt a state tax whose legal incidence is borne by a nonmember. The presence of such value was undisputed there, since the involved state oil and gas taxes were assessed with respect to on-reservation production from tribal lands pursuant to a

lease between the non-Indian producer and the tribe. 490 U.S. at 168-69. In sustaining the tax against a *White Mountain Apache*-based challenge, the Court reasoned that while "[i]t is . . . reasonable to infer that the New Mexico taxes have at least a marginal effect on the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate[,]" such impairment in itself was "simply too indirect and too insubstantial" to invalidate the state taxes. *Id.* at 186-87. What was instead dispositive was the fact that the State provided "'substantial services'" to the tribe and the mineral lessee (*id.* at 1850). These same principles apply where an excise or other type of state taxation is in question. *See, e.g., Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994) (stamped cigarette allocation scheme); *Gila River Indian Cmty. v. Waddell*, 91 F.3d 1232, 1237 (9th Cir. 1996) (transaction privilege tax). The decision below applying *White Mountain Apache* cannot be reconciled with *Cotton Petroleum*.

CONCLUSION

For the foregoing reasons, and for those in the Petition, Kansas respectfully requests that the Court grant this petition for a writ of *certiorari*.

Respectfully submitted,

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